

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>PRAXAIR DISTRIBUTION, INC.,</b>  <b>and</b>  <b>PABLO RIVERA, an Individual</b>	<b>Case No. 28-CA-23266</b>
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**PRAXAIR DISTRIBUTION, INC.'S BRIEF**  
**IN OPPOSITION TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS**  
**TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. STATEMENT OF THE CASE**

Respondent Praxair Distribution, Inc. (“PDI” or the “Company”) maintains a distribution facility located in Phoenix, Arizona (the “Phoenix plant”). In early November 2010, management received reciprocal complaints from two employees at the Phoenix plant about one another. In one set of complaints, Gary Kallias told Human Resources Manager Carson Mellott that Pablo Rivera annoyed coworkers with his whistling, was possessive of Plant equipment, and tried to get coworkers into trouble by making unjustified complaints about them. He also claimed Mr. Rivera pushed him. In the other complaints, Mr. Rivera told Plant Manager David Schmidt that Mr. Kallias used an unmarked parking space that he preferred, said things about him that he did not like, was inconsiderate with equipment, and tried to prevent him from selecting a donut one morning when Mr. Schmidt brought in a box for employees to share. Neither employee alleged, and the complaints did not evidence, any protected, concerted activity. In fact, with the arguable exception of Mr. Kallias’ claim that Mr. Rivera pushed him, the complaints were personal and were only incidentally connected to their employment.

Nevertheless, Mr. Mellott undertook a conscientious investigation including interviews with Mr. Kallias and Mr. Rivera at the Phoenix plant on November 4, 2010. He concluded his investigation with reminders to both employees about the need for maturity in the workplace.

The Amended Complaint (“Am. Compl.”) takes issue with Mr. Mellott’s conduct during his interview with Mr. Rivera. In particular, it alleges that Mr. Mellott unlawfully denied Mr. Rivera’s purported request for a coworker representative, Am. Compl. ¶¶ 4(a)(4), (b), (c); interrogated Mr. Rivera and imposed a rule prohibiting Mr. Rivera from discussing concerted activities with coworkers, *id.* ¶ 4(a)(1), (2); and threatened Mr. Rivera with unspecified reprisals for engaging in protected activities. *Id.* ¶ 4(a)(3).

Following a hearing and submission of post-hearing briefs by counsel for Respondent and the Acting General Counsel (“AGC”), Administrative Law Judge William L. Schmidt issued his Decision dated July 19, 2011 (the “ALJD”). In summary, Judge Schmidt recommended dismissing the Complaint in its entirety. ALJD p. 10, line 37.

First Judge Schmidt found, contrary to the claim in the Amended Complaint, that the evidence demonstrated Mr. Rivera did not request a coworker representative during the interview on November 4, 2010. *Id.* p. 10, lines 7, 10, 17. Mr. Rivera’s vague request to make a telephone call before preparing a routine written statement at the end of his interview with Mr. Mellott was in no way tantamount to a request for a *Weingarten* representative. *Id.* p. 10, lines 18-20. In fact, Mr. Rivera conceded at the hearing that he had no intention of calling a coworker but instead planned to call his wife, who is not a PDI employee. *Id.* p. 10, lines 19-20. In any event, had one been requested, Mr. Rivera was not entitled to a representative under *IBM Corp.*, 341 NLRB 1288 (2004). *Id.* p. 10, lines 10-12.

Second, Judge Schmidt found there was no interrogation about, nor promulgation of an unlawful rule prohibiting concerted activity. “The AGC offered *no evidence* that [Mr.] Mellott asked any questions regarding any protected activity.” *Id.* p. 10, lines 33-35 (emphasis added). After all, the purpose of the November 4, 2010 interview was to investigate individual complaints made by Mr. Rivera and Mr. Kallias about each other. *Id.* p. 10, lines 36-39. Mr. Rivera, for his part, did not claim that any coworker would share or even corroborate his complaints about Mr. Kallias. *Id.* p. 10, lines 16-18 (“[Mr.] Rivera...made no known effort to enlist any other employee to assist in putting an end to [Mr.] Kallias’ annoying conduct”). When Mr. Rivera requested to make a phone call at their end of the interview, he did not say, and Mr. Mellott could not have assumed, Mr. Rivera intended to call a coworker. *Id.* p. 9, lines 15-16. In

fact, that was not Mr. Rivera's intention. *Id.* p. 10, line 19. Mr. Mellott did not ask who Mr. Rivera wanted to call, but denied the request because of time constraints. *Id.* p. 8, lines 34-35, p. 9, lines 51-21. Accordingly Judge Schmidt ruled "[n]o evidence supports a rational finding that [Mr.] Mellott, acting on behalf of Respondent, promulgated a rule banning employees from calling coworkers in the circumstances similar to those found here or from engaging in any other form of protected concerted activity." *Id.* p. 9, lines 24-27.

Third, Mr. Mellott did not threaten Mr. Rivera when he delayed providing a copy of Mr. Rivera's written statement to him to confirm PDI's practice. In fact, Mr. Schmidt furnished a copy of Mr. Rivera's statement to him the same day he requested it. *Id.* p. 9, line 41. As Judge Schmidt concluded, Mr. Mellott did not make any coercive statements to Mr. Rivera or otherwise interfere with his protected rights in connection with the request. *Id.* p. 9, line 45-46.

On August 24, 2011, AGC filed Exceptions to the Decision, rehashing precisely the same arguments that Judge Schmidt previously considered and correctly rejected. Judge Schmidt's factual conclusions are entitled to considerable deference by the Board. This Brief in Opposition is timely submitted pursuant to Rule 102.46 of the Board's Rules and Regulations. The Board should adopt the Decision for the reasons stated by Judge Schmidt and in this Brief in Opposition, and dismiss the Amended Complaint.

## **II. STATEMENT OF FACTS**

### **A. Background Concerning Mr. Kallias' And Mr. Rivera's Complaints And Mr. Mellott's Investigation Into Them**

On about November 1, 2010, Mr. Mellott received complaints about Mr. Rivera during a phone call from his coworker, Mr. Kallias. Tr. 21, 38. Mr. Kallias complained about Mr. Rivera's conduct, including walking behind coworkers and whistling to annoy them. Tr. 22. Mr. Kallias also said that Mr. Rivera was trying to get coworkers into trouble, for instance by making

unjustified complaints whenever a coworker used equipment near Mr. Rivera's work area. *Id.* He also alleged that Mr. Rivera pushed him, an allegation that later was corroborated by coworker Shaun Hernandez during a telephonic interview with Mr. Mellott. Tr. 22, 27.

Around the same time, Mr. Mellott received information from the Plant Manager, Mr. Schmidt, about complaints Mr. Rivera made about Mr. Kallias. Tr. 112. Mr. Rivera reported the complaints to Mr. Schmidt on about October 28, 2010. *Id.* As was his practice when dealing with personnel matters, Mr. Schmidt told Mr. Rivera that he would notify Mr. Mellott about the complaints, and in fact he did so a few days later. Tr. 52, 112. Mr. Rivera made no objection to an investigation of his concerns by Human Resources. Naturally he would not have made complaints to Mr. Schmidt unless he expected some action to be taken. Later Mr. Schmidt informed Mr. Rivera that Mr. Mellott would be coming to the plant in the next few days to discuss his complaints. Tr. 122. Mr. Mellott's office is located in Salt Lake City, Utah.

Based on the complaints from Mr. Kallias, and those reported by Mr. Schmidt from Mr. Rivera, Mr. Mellott decided to come to the Phoenix plant to investigate further. On the morning of November 4, 2010 Mr. Mellott arrived at the plant and spoke with Mr. Schmidt. Tr. 128. They discussed Mr. Kallias' and Mr. Rivera's complaints, and the meetings Mr. Mellott planned to conduct with each of them. *Id.* They met with Mr. Kallias first in the plant distribution office. Tr. 39-40, 128. They planned to meet with Mr. Rivera second in the same location. Tr. 129.

After the meeting with Mr. Kallias, Mr. Schmidt went to the plant floor where Mr. Rivera was working and told him that Mr. Mellott had arrived and wanted to discuss his complaints. Tr. 113. He asked whether Mr. Rivera was at a point in his work that he could stop to speak with Mr. Mellott. *Id.* Mr. Rivera said yes, but he would need a few minutes. *Id.* Mr. Schmidt told Mr. Rivera they would be in the distribution office and asked him to meet there. Tr. 114. Mr.

Rivera finished the work he was doing while Mr. Schmidt returned to the distribution office. Tr. 113 Mr. Rivera arrived in the office about five minutes later. Tr. 114, 129.

The distribution office was selected for the meetings with Mr. Kallias and Mr. Rivera because that is where Mr. Schmidt typically conducts meetings involving more than one other person. Tr. 114. The distribution office is the largest of the manager's offices and is most appropriate for group meetings. *Id.* Mr. Rivera acknowledged it is a well lit office and had sufficient seating to accommodate him, Mr. Mellott and Mr. Schmidt for their meeting. Tr. 75.

**B. Mr. Mellott And Mr. Schmidt's Interview With Mr. Rivera**

When Mr. Rivera arrived at the office, he and Mr. Mellott exchanged some pleasantries. Tr. 114, 129. Mr. Schmidt introduced the purpose of the meeting by saying that Mr. Mellott had come to discuss the allegations Mr. Rivera made about Mr. Kallias. Tr. 115, 129. Mr. Mellott asked Mr. Rivera to explain all of the concerns he had. Tr. 23, 53, 130.

Mr. Mellott testified that Mr. Rivera described about six different issues, all dealing with Mr. Kallias' conduct in the plant. Tr. 23, 41, 130. Mr. Rivera testified that he presented about eight issues, but likewise attributed all of his complaints to "incidents that happened because [of Mr.] Kallias' behavior." Tr. 77. He enumerated incidents in which Mr. Kallias allegedly: "was mocking me, making fun about me and talking to the workers about me;" used an unmarked parking spot that he preferred; filled his helmet with water and left it in the men's restroom; used a dolly that he liked to use; said negative things about him to a new employee at the Plant; tried to use a carbon dioxide pump at the same time Mr. Rivera was using it; failed to open a door for him when the door was locked, and pretended he did not know Mr. Rivera was outside trying to enter; tried to prevent Mr. Rivera from picking a donut when Mr. Schmidt brought donuts for the employees; and mimicked his whistling. Tr. 77-84. After discussing Mr. Rivera's complaints, Mr. Mellott also asked Mr. Rivera about Mr. Kallias' claim that Mr. Rivera pushed him. Tr. 53.



Mr. Rivera denied it. *Id.*

After they discussed the complaints, Mr. Mellott asked Mr. Rivera to prepare a written statement summarizing them. Tr. 23, 53, 116, 131, 137. According to Mr. Schmidt's and Mr. Mellott's testimony, Mr. Rivera, for the first time, said he wanted to use the phone. Tr. 116, 131. He did not give any indication of who he wanted to call or explain the purpose of the call, tr. 110, 119, 132, but Mr. Rivera testified at the hearing that he wanted to call his wife to ask whether he should provide the written statement. Tr. 109. Mr. Mellott and Mr. Schmidt both testified that Mr. Mellott denied Mr. Rivera's request. Tr. 117, 131. He told Mr. Rivera that he was under a time constraint attributable to his flight out of Phoenix that day. *Id.* Mr. Rivera and Mr. Mellott both testified that Mr. Mellott told him if he did not want to submit a written statement, Mr. Mellott would simply indicate that in his notes and end the meeting. Tr. 63, 131.

It is not disputed, and Mr. Rivera conceded that Mr. Mellott told him he could choose not to prepare a written statement, which would have obviated the need to continue the meeting. Tr. 63. Nevertheless, Mr. Rivera also claimed that Mr. Mellott denied his request to leave and physically prevented him from leaving the distribution office. Tr. 64. That was false. As both Mr. Mellott and Mr. Schmidt testified, Mr. Rivera did not request to leave, nor request to terminate the meeting, nor object to providing a written statement, nor reiterate his request to use the telephone at any time during the interview. Tr. 119, 132. Mr. Mellott and Mr. Schmidt both testified that Mr. Rivera did not try to leave the office and neither Mr. Mellott nor Mr. Schmidt attempted to prevent him from doing so. Tr. 25, 132.

By his own account Mr. Rivera spent the next 30 minutes or so sitting in the distribution office with Mr. Mellott, preparing a three page single spaced summary of eight different complaints he had about Mr. Kallias. Mr. Rivera's preparation of such a comprehensive written

statement suggests that he willingly prepared the statement and also desired to make it complete. In fact, the tenor and content of the written statement demonstrates that Mr. Mellott and Mr. Schmidt accurately described the interview as methodical and lacking any sort of drama. *See* General Counsel's Exhibit ("GC Exh.") 3. They explained that after the denial of his request to make a phone call, Mr. Rivera sat down with a pen and a yellow pad and began writing. Tr. 117, 133. Consistent with that testimony, Mr. Rivera's statement begins by recounting a "list of incidents that I presented" to Mr. Mellott and Mr. Schmidt during the interview, and concludes stating that the incidents made him feel "rejected" and disrespected – not by Mr. Mellott or Mr. Schmidt but by his coworkers. GC Exh. 3. Mr. Rivera made no claim in the statement about any objectionable conduct during the interview. Tr. 96; GC Exh. 3.

Mr. Rivera did not complain to management that he did not want to prepare a written statement, or that he was prevented from leaving the distribution office, or that he objected to any aspect of his interview with Mr. Mellott. He did not complain to Mr. Schmidt in the plant after the interview on November 4, 2010 and he did not contact Human Resources to complain at any subsequent time. Mr. Rivera was well aware of the existence of an employee hotline that is available for PDI employees to submit complaints. The hotline is described both in the Employee Handbook and Standards of Business Integrity, with which Mr. Rivera was familiar. GC Exh. 4, 5. Nevertheless, Mr. Rivera's only reference to the November 4, 2010 interview after that date in any communication to PDI was in a letter to Mr. Schmidt dated November 11, 2010 in which he asserted new complaints about Mr. Kallias. GC Exh. 3. There, Mr. Rivera reminded Mr. Schmidt about Mr. Mellott's request during the interview that he "act in a responsible manner with maturity and in a professional way so as to avoid conflicts with Kallias." *Id.* Mr. Rivera did not object to Mr. Mellott's conduct at the November 4, 2010

meeting to PDI at any subsequent time. Tr. 99, 121, 136.

**C. Mr. Rivera Prepares His Written Statement, And Later Mr. Schmidt Provides A Copy To Him As Requested**

When the discussion of Mr. Rivera's complaints at the November 4 interview concluded, Mr. Rivera began preparing his written statement. Seeing no further need to act as a witness, Mr. Schmidt asked whether it would be appropriate for him to leave to attend to other business. Tr. 53, 117, 133. Mr. Mellott agreed. *Id.* Mr. Schmidt left at that time and did not return to the distribution office. Tr. 55, 120. During the remainder of the time Mr. Rivera spent in the office, he asked Mr. Mellott to verify spellings of certain words while he prepared his written statement, but they did not discuss Mr. Rivera's complaints about Mr. Kallias or Mr. Kallias' complaints about him. Tr. 133. Mr. Rivera did not reiterate his request to make a call, or request to end the meeting, or object to providing a written statement, and he did not request to leave the distribution office. *Id.* Mr. Rivera conceded that Mr. Mellott did not limit the scope or subjects of his written statement, and further conceded that Mr. Mellott told him to take all the time he needed to complete his statement. Tr. 98, 134.

Finally, Mr. Rivera provided Mr. Mellott the statement he prepared. Tr. 135; GC Exh. 3. The statement contains a straightforward recitation and summary of Mr. Rivera's complaints about Mr. Kallias, and nothing else. Tr. 136.

Mr. Rivera provided the written statement to Mr. Mellott, and then asked if he could have a copy. Initially Mr. Mellott delayed responding to the request. Tr. 135. Mr. Rivera alleged that Mr. Mellott told him that he did not want to "get a surprise" later, in the event Mr. Rivera decided to contact a government agency. Tr. 68. Mr. Mellott testified he said no such thing, but told Mr. Rivera that he wanted to speak with someone about whether it would be appropriate to provide Mr. Rivera a copy before doing so. *Id.* Later the same day Mr. Schmidt provided Mr.

Rivera a complete copy of his statement in the plant. Tr. 124.

Mr. Mellott completed his investigation into Mr. Rivera's complaints, and on December 8 provided Mr. Rivera a letter summarizing his conclusions. Tr. 27; GC Exh. 3. The letter contained nine paragraphs that addressed all of the allegations by Mr. Rivera about Mr. Kallias, including among others those concerning the parking space; Mr. Kallias' use of cylinder carts and the carbon dioxide pump; whistling in the Plant; and the claim about Mr. Rivera's donut ("In the case of the incident during which you attempted to pick a donut in the lunch room, my investigation was unable to substantiate your claim that Mr. Kallias grabbed your hand to prevent you from making a selection"). GC Exh. 3. It also addressed Mr. Mellott's conclusion with respect to Mr. Kallias' claim that Mr. Rivera pushed him ("I want to remind you that retaliating by bumping, brushing or striking another employee is totally inappropriate and will not be tolerated"). *Id.* While the letter was in no way disciplinary, Mr. Mellott provided some suggestions to Mr. Rivera that he felt, in his words, would "help promote [Mr. Rivera's] job satisfaction at the Phoenix plant, and also prevent future conflicts" with coworkers. *Id.* Those included suggestions about the parking lot; use of Plant equipment; communicating with supervisors about job duties and requirements; and treating coworkers with respect. No disciplinary action arose out of Mr. Mellott's interviews with Mr. Rivera and Mr. Kallias.

### **III. MR. MELLOTT'S INTERVIEW WITH MR. RIVERA DID NOT VIOLATE MR. RIVERA'S SECTION 7 RIGHTS**

#### **A. Mr. Rivera Did Not Request, And Was Not Denied A Right To A Coworker Representative**

The Amended Complaint alleges that during Mr. Rivera's interview on November 4, 2010 Mr. Mellott denied his "request...to be represented by another employee during [the] interview" and "proceeded with the interview even though [Mr. Mellott] had denied [Mr. Rivera's] request for representation as described above." Am. Compl. ¶¶ 4(a)(4), (b), (c). Judge

Schmidt correctly recommended dismissing these allegations based, in part, on the Board's rule in *IBM Corp.*, 341 NLRB at 1288.

AGC's request that the Board overrule *IBM Corp.* is unwarranted and should be denied. There, the Board ruled that employees in a non-union setting do not enjoy the same *Weingarten* rights to which union represented employees are entitled, and commented on four critical differences between the role of a coworker and a union representative as follows: 1) coworkers do not represent the interests of the entire work force; 2) coworkers cannot redress the imbalance of power between employers and employees; 3) coworkers do not have the same skills as a union representative; and 4) the presence of a coworker may compromise the confidentiality of information. *Id.* at 1291-93. Employees at the Phoenix plant are not represented by a labor organization, and all of the shortcomings of a coworker representative identified in *IBM Corp.* would apply to any coworker Mr. Rivera might have requested to assist him.

This case is not an appropriate vehicle for overruling *IBM Corp.* in any event. As Judge Schmidt concluded, AGC failed to present *any evidence* that Mr. Rivera requested to be represented by another employee during the interview. Indeed, Mr. Rivera testified at the hearing that he *did not request* a representative at any time. ALJD p. 10, lines 18-20 (“[W]hen [Mr. Rivera] requested to make a phone call, the key fact on which the [AGC] has fashioned this allegation, he admittedly sought to speak with his wife, who is not an employee of Respondent”). Because it is fundamental that the right to representation arises “only in situations where the employee *requests representation*,” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-57 (1975) (emphasis added), the allegation in the Amended Complaint would have to be dismissed even under a different rule than dictated by *IBM Corp.*

AGC contends in the Exceptions, as he did in identical arguments to Judge Schmidt, that

Mr. Rivera's generic request to make a phone call before preparing a written statement at the end of his interview was tantamount to a request for a representative. That claim is ironic and self-defeating. After all, Mr. Rivera's interview involved purely personal gripes and complaints about Mr. Kallias. Certainly nothing during the interview suggested that his request to make a phone call was to enable Mr. Rivera to ask Mr. Kallias for advice.

Nor is there any evidence that Mr. Rivera sought representation by any other coworker. Again, the interview involved Mr. Rivera's own personal complaints about his conflicts with Mr. Kallias. He did not claim that Mr. Kallias treated any of their coworkers as poorly as Mr. Kallias treated him; and he did not so much as claim that any coworker would corroborate any of his claims. Mr. Rivera did not contend that he engaged in any concerted complaining about Mr. Kallias. He simply gave no indication that he desired to have any coworker represent him.<sup>1</sup>

In fact Mr. Rivera had no intention of calling a coworker. He testified that he wanted to call his wife before preparing his written statement. As a result, even if Mr. Mellott had somehow correctly gleaned from Mr. Rivera's request that his true intention was to call his wife, his denial in no way implicated a request for coworker representation. Mr. Rivera's frustrated desire to speak with his wife does not raise an issue under the Act.

Certainly there is no evidence that Mr. Mellott independently (but erroneously) inferred that Mr. Rivera sought representation by a coworker. As a result, this case is fundamentally different from *Montgomery Ward & Co.*, 273 NLRB 1226 (1984), cited by AGC. In

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<sup>1</sup> As a result, and as AGC acknowledges, this case is entirely different from *Buonadonna Shoprite, LLC*, 356 NLRB No. 115 (2011), which he nevertheless relies upon heavily in his brief. There, the ALJ reasoned that management was entitled to deny an employee's request for a specific *Weingarten* representative under circumstances where the right to representation clearly applied. The ALJ also concluded management acted unreasonably by refusing the employee's request to confer with his selected representative by phone, because the attempted call would not have meaningfully delayed the interview.

*Montgomery Ward*, the employee's explicit request for his work supervisor to represent him put management on notice of his desire for representation. Managers further demonstrated they understood the employee was requesting a coworker representative when they responded that the employee would not be allowed *any representative*, and that the employee's *sole protection* would be a tape recording of the meeting. *Id.* at 1226. Here Mr. Rivera did not even suggest that he desired assistance from anyone in the plant, and according to Mr. Rivera's own testimony, he *did not desire* such assistance: he claimed he intended to call his spouse, who is not a PDI employee.

Judge Schmidt correctly found Mr. Mellott did not ask Mr. Rivera who he intended to call, and he further correctly found Mr. Mellott did not tell Mr. Rivera that he was prohibited from calling a coworker. Decision p. 6, lines 34-38. Although AGC generally ignores them, Judge Schmidt's factual determinations are entitled to considerable deference.

Finally, while Judge Schmidt saw no need to engage in "what if" speculation as to whether [Mr.] Mellott acted properly if it could be assumed that [Mr.] Rivera's request to make a phone call amounted to a request for coworker representation," Decision p. 10, lines 22-24, Mr. Mellott's conduct after Mr. Rivera's request to make a phone call was entirely appropriate. It is well settled that when an employee makes a request for a representative, the interviewer has the option of granting the request, discontinuing the interview, or offering the employee the choice of continuing the interview without the representative or foregoing the interview and any benefits it might have conferred. *See Meharry Med. Coll.*, 236 NLRB 1396 (1978). *It is undisputed* that after denying Mr. Rivera's request to make a phone call to some unidentified person, who turned out to be his wife, Mr. Mellott told Mr. Rivera that although he was requesting a written statement from him, Mr. Rivera could choose not to prepare a statement.

Mr. Mellott denied, and the circumstances refute, that Mr. Rivera was compelled to prepare a statement. The evidence demonstrates convincingly that Mr. Mellott did not insist upon continuing the meeting with Mr. Rivera against his will.

In short, Mr. Rivera was not entitled to a *Weingarten* representative. He did not request one, and such a request was not unlawfully denied. The pertinent allegations in the Amended Complaint have no merit. Judge Schmidt's Decision should be adopted in pertinent part. The allegations in the Amended Complaint should be dismissed.

**B. Mr. Mellott Did Not Interrogate Mr. Rivera About Or Promulgate An Unlawful Rule Prohibiting Discussion Of Any Concerted Activities**

Paragraphs 4(a)(1) and (2) of the Amended Complaint allege that during the interview on November 4, 2010 Mr. Mellott interrogated employees about and imposed an unlawful rule prohibiting discussion of protected, concerted activities. AGC contended at the hearing that the unfair labor practices occurred when Mr. Rivera asked to make a call before preparing a written statement. Mr. Mellott allegedly asked who Mr. Rivera intended to call before imposing a rule prohibiting such calls. Tr. 142. Judge Schmidt rejected both contentions. "The AGC offered *no evidence* that [Mr.] Mellott asked any questions regarding protected activity, or inquired as to who [Mr.] Rivera intended to call during the interview." *Id.* p. 8, lines 33-35. There is "*no factual support*" for AGC's claim of interrogation. *Id.* p. 8, line 35. "*No evidence* supports a finding that [Mr.] Rivera ever intended to call another employee or ever disclosed to [Mr.] Mellott that he wanted to call another employee." *Id.* p. 9, lines 15-16. Further, "*no evidence* supports a *rational finding* that [Mr.] Mellott, acting on behalf of Respondent, promulgated a rule banning employees from calling coworkers in the circumstances similar to those found here or from engaging in any other form of protected concerted activity." *Id.* p. 9, lines 24-27.

AGC provides no reason for second-guessing Judge Schmidt with respect to his factual



determinations, which as the Judge repeatedly notes, are crystal clear in the record. In fact, Mr. Rivera's claim upon which AGC relies in the Exceptions is not only self-serving and inherently unbelievable but contradicted by his own inconsistent testimony. When questioned by counsel about what specific questions Mr. Mellott posed during his investigatory interview, Mr. Rivera testified that he could recall only two: whether Mr. Rivera lied to him during a prior discussion when he told Mr. Mellott everything was going well for him at the plant; and whether he pushed Mr. Kallias during an incident at work. Tr. 91-92. Mr. Rivera said *nothing* in response to counsel's *direct question* about Mr. Mellott's alleged inquiry about who he intended to call. Tr. 92. That is not just because the question he later claimed Mr. Mellott asked had a negligible and not a coercive impact on him; it was because as Mr. Schmidt and Mr. Mellott both testified, and as Judge Schmidt concluded, *no one asked him who he intended to call*.

Both Mr. Schmidt and Mr. Mellott testified that after Mr. Mellott requested Mr. Rivera to prepare a written summary of his complaints about Mr. Kallias, Mr. Rivera asked whether he could make a phone call. Both testified that Mr. Mellott said no. Mr. Mellott was not interested in who Mr. Rivera wanted to call; he told Mr. Rivera he wanted the statement in Mr. Rivera's own words. Mr. Mellott also told Mr. Rivera that he would not permit a call at that time because he had to catch a flight out of Phoenix. Judge Schmidt likewise concluded as follows:

At the conclusion of his report about [Mr.] Kallias, [Mr.] Mellott asked [Mr.] Rivera if he bumped [Mr.] Kallias in the bathroom during the past week. [Mr.] Rivera denied this accusation. [Mr.] Mellott then requested that [Mr.] Rivera put his claims in writing. At first, [Mr.] Rivera refused and asked to make a phone call. [Mr.] Mellott denied this request and said that if [Mr.] Rivera refused to write out his complaints he would make a note of that and report that [Mr.] Rivera refused to cooperate. [Mr.] Schmidt corroborated these facts and testified that [Mr.] Mellott told [Mr.] Rivera he could not make a call because he wanted to get the information in [Mr.] Rivera's own words and he had to leave soon to catch a plane. ALJD p. 6, lines 32-38.

In fact, in the context of the interview there was no reason for Mr. Mellott to ask who

might have been called. Mr. Rivera spent the entire interview cataloging aggravating conduct and perceived personal insults by Mr. Kallias. Mr. Rivera did not ask Mr. Mellott to interview any other employee and he did not claim any employee would have any interest in his own personal claims about Mr. Kallias. As Judge Schmidt concluded, “as the entire session between [Mr.] Mellott and [Mr.] Rivera pertained to [Mr.] Rivera’s personal complaints about another employee and that employee’s complaints about [Mr.] Rivera, the vast bulk of the session involved no protected concerted activity on [Mr.] Rivera’s part at all.” ALJD p. 8, lines 36-38. Without coercive questioning aimed directly at concerted employee activity such as an alleged discussion between Mr. Rivera *and a coworker*, there is no basis for finding unlawful interrogation. *See Rossmore House*, 269 NLRB 1176, 1178 n. 20 (1984), *enfd.* 760 F.2d 1006 (9<sup>th</sup> Cir. 1985) (articulating the Board’s current test analyzing “whether under all the circumstances the [alleged] interrogation tends to restrain, coerce, or interfere with rights guaranteed under the Act”). Likewise, absent a rule prohibiting a call from an employee *to a coworker*, there is no basis for finding interference with Section 7 rights. As described above, there has been no violation of Section 8(a)(1) here even if Mr. Mellott prevented Mr. Rivera from calling his wife to discuss his written statement. *See* ALJD p. 10, lines 17-20.

AGC failed to meet his burden of proving either that unlawful interrogation occurred or that an unlawful rule was imposed prohibiting concerted activities. Mr. Mellott did not ask Mr. Rivera who he intended to call, and by denying Mr. Rivera’s request to make a call to some unidentified person, he did not interfere with rights protected by Section 7. The pertinent allegations of the Amended Complaint have no merit. Judge Schmidt’s recommended Decision should be adopted.

**C. AGC's Claims That Mr. Mellott's Request For A Written Summary Of Mr. Rivera's Complaints Constituted Interrogation Or Retaliation Are Precluded By His Representations At The Hearing And, In Any Event, Have No Merit**

At the hearing, AGC foreclosed the argument he asserted in his brief to Judge Schmidt, and renewed again in the Exceptions, that somehow Mr. Mellott's request that Mr. Rivera put his complaints about Mr. Kallias in writing constituted unlawful interrogation. AGC represented at the hearing that the generic interrogation allegation in the Amended Complaint was based on his claim that Mr. Mellott asked Mr. Rivera who he intended to call before denying the request. During his exchange with Judge Schmidt, AGC made the following representations:

Judge Schmidt: Back on record. General Counsel, when I read your brief, what am I going to be reading about in connection with the interrogation that you claim has occurred?

What is it that you feel the interrogation was in this case?

Mr. Mabry: Carson Mellott asking Mr. Rivera who he's going to call.

Judge Schmidt: I see, okay. And the overly broad and discriminatory rule is the prohibition against making the call?

Mr. Mabry: Yes, Your Honor. Tr. 142.

While AGC argues in his Exceptions that due process is a mere technical nicety, his conduct at the hearing mislead and affirmatively prevented Respondent from responding to the contention he made in his post-hearing brief that Mr. Mellott's routine request for a written statement somehow constituted interrogation.<sup>2</sup> AGC now exacerbates the serious impropriety in his post-hearing brief to Judge Schmidt by requesting the Board to give credence to arguments about the requested written statement that his own hearing conduct foreclosed. The Board should reject AGC's misguided and untimely after-thoughts about the written statement request.

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<sup>2</sup> As AGC recognizes, Rule 102.17 of the Board's Rules provides that the proper procedure for requesting leave to amend an administrative complaint is by motion, not by sand-bagging a respondent in a post-hearing brief.

In any event, and in spite of AGC's protestations, Judge Schmidt considered the argument and rejected it. He ruled: "[Mr.] Mellott's request that [Mr.] Rivera put his personal complaints in writing does not amount to coercive questioning concerning any protected subject." ALJD p. 8, lines 46-47.

For the reasons described above, and amply explained by Judge Schmidt in his Decision, the incidents under investigation during the interview with Mr. Rivera did not involve any protected, concerted activity. Given that, AGC's Exceptions simply belabor alleged concerted complaining by Mr. Rivera and his former coworker Abe Tarango *more than a year* before the interview that is at issue here. Those incidents were subject to a prior administrative complaint that was ruled upon by Judge Gregory Meyerson in a decision recommending *dismissal of every single allegation that arose out of conduct at the Phoenix plant or by a Phoenix plant employee. Praxair Distribution Inc.*, 2010 NLRB LEXIS 209 (2010). Not even AGC contends that there is any evidence of retaliation against Mr. Rivera based on the prior incidents or the proceedings before Judge Meyerson. His repeated references to those other, earlier matters in the Exceptions strongly underscores the total absence of any concerted activity at any time remotely relevant to the November 4, 2010 interview with Mr. Mellott.

The complaints by Mr. Rivera and Mr. Tarango were totally unrelated to any of the distinctly personal issues between Mr. Rivera and Mr. Kallias that Mr. Rivera took up with management in November 2010. Mr. Mellott and Mr. Schmidt both testified that neither Mr. Tarango, nor the investigation over a year earlier, nor Judge Meyerson's decision was even so much as discussed during the November 4, 2010 interview. Tr. 25, 135. It is impossible to imagine how Mr. Mellott's request that Mr. Rivera prepare a written summary of his complaints about Mr. Kallias could possibly constitute interrogation into the concerted complaining over a

year earlier by Mr. Rivera and Mr. Tarango. AGC does not even suggest how Mr. Rivera could have felt coerced during the interview in November 2010 into disclosing concerted activities that allegedly occurred in October 2009 that were the subject of Judge Meyerson's Decision.

AGC again protests that Judge Schmidt did not consider and grant his inappropriate request to amend the Amended Complaint to add an allegation that the same request for a written statement constituted retaliation for alleged protected activities. In this respect (and AGC's dismissive view of due process notwithstanding) AGC's arguments border on the surreal. On the one hand, AGC claims that the retaliation claim is so similar to the interrogation claim that it should be tagged onto the Amended Complaint as if it always had been there. On the other hand, AGC simultaneously argues that Judge Schmidt committed serious error by failing to rule on that substantially similar claim. These arguments cannot be reconciled. Judge Schmidt should not have entertained the retaliation or interrogation claims based on AGC's conduct at the hearing, as described above. Nevertheless, Judge Schmidt's Decision on the subject of Mr. Mellott's request for a written statement is clear enough to answer AGC's allegations in both respects. "[Mr.] Mellott's request that [Mr.] Rivera put his personal complaints in writing does not amount to coercive questioning concerning any protected subject." ALJD p. 8, lines 46-48. The request for a written statement was routine, it was in no way coercive, and it did not violate the Act. AGC's request to amend the Amended Complaint should be denied.

**D. Mr. Mellott Did Not Threaten Mr. Rivera Concerning The Exercise Of Protected Rights**

The Amended Complaint alleges that Mr. Mellott made threats of unspecified reprisals for engaging in concerted activity during the interview with Mr. Rivera. Am. Compl. ¶ 4(a)(3). AGC argued at the hearing that after Mr. Rivera requested a copy of his statement, Mr. Mellott responded that he did not want to get a "surprise" because a lawyer becomes involved or Mr.

Rivera decides to contact government agencies. Tr. 142. However, AGC failed to meet his burden to establish by a preponderance of the evidence that the alleged threat, or any other, was made during the interview. Mr. Mellott testified forthrightly that he did not make any threat to Mr. Rivera. Mr. Mellott had no obligation under the Act, or any other legal obligation, to provide Mr. Rivera a copy of the statement that he prepared. Mr. Mellott did not violate Mr. Rivera's rights when he delayed in providing a copy of the statement so that he could speak with others about PDI's practice with respect to furnishing witness statements. The fact that PDI did provide Mr. Rivera a copy of his statement on the same day he requested it seems fatal to the claim that Mr. Mellott threatened Mr. Rivera for having made the request in the first place.

In any event, and as Judge Schmidt concluded, the statement Mr. Rivera attributed to Mr. Mellott was not an unlawful threat. ALJD p. 9, lines 41-46. Mr. Rivera has initiated agency investigations in the past, including a prior charge with Region 28 that blossomed into an administrative complaint. Judge Meyerson issued his decision in August 2010 dismissing all but one of the allegations in that complaint. Mr. Rivera continues to work in the same position working under the same employment terms as he has for years. PDI's consistent respect for Mr. Rivera's right to make complaints and seek agency involvement speaks loudly. Certainly it speaks much louder than the innocuous incidental statement alleged by AGC, and denied by Mr. Mellott. There have been no unlawful threats toward Mr. Rivera.

As Judge Schmidt ruled, "I am unable to conclude that the statement [Mr. Mellott] made when refusing [Mr.] Rivera a copy of his statement at the end of the interview amounts to either an explicit or implicit threat." ALJD p. 9, lines 43-35. His Decision is well supported and should be adopted. The Amended Complaint should be dismissed.

#### IV. CONCLUSION

For all of the foregoing reasons, PDI respectfully requests that the Board adopt Judge Schmidt's Decision and dismiss the Amended Complaint.

DATED this 7<sup>th</sup> day of September, 2011.

A handwritten signature in black ink, appearing to be 'F. C. Miner', written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that I have this 7<sup>th</sup> day of September, 2011 caused an original of the foregoing **Brief In Opposition To The Acting General Counsel's Exceptions To The Decision Of The Administrative Law Judge** to be filed electronically with:


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I further certify that I have caused copies of the foregoing document to be served via electronic mail on the following:

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